



DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 15-23]

Brown's Discount Apothecary, BC, Inc., and Bolling Apothecary, Inc.

On May 18, 2015, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Brown's Discount Apothecary, BC, Inc. (holder of DEA Certificate of Registration FB3717153), of Jasper, Alabama and Bolling Apothecary, Inc., (holder of DEA Certificate of Registration AB9375456), of Fayette, Alabama. Show Cause Order, at 1. The Show Cause Order proposed the revocation of each pharmacy's DEA Certificate of Registration, on the ground that on April 7, 2015, the Alabama State Board of Pharmacy issued an Emergency Suspension Order suspending each pharmacy's Alabama Controlled Substances Permit, and that therefore, each pharmacy is "without authority to handle controlled substances in Alabama, the [S]tate in which each is registered with the DEA." *Id.* at 1-2.

On May 20, 2015, a Diversion Investigator from the Birmingham District Office personally served the Order to Show Cause on Bolling Apothecary, Inc. Notice of Service of Order to Show Cause, at 1. According to the Government, on June 2, 2015, an attorney "accepted service by email of the Order to Show Cause on behalf of Brown's Discount Apothecary and its owner George Bolling, Jr. *Id.*

On June 1, 2015, George R. Bolling, Sr., owner of Respondent Bolling Apothecary, Inc., filed a request for a hearing on behalf of the pharmacy with the Office of Administrative Law Judges (OALJ). Letter of Bolling Apothecary, Inc., to Hearing Clerk, OALJ (May 23, 2015). Mr. Bolling did not, however, request a hearing on behalf of Brown's Discount Apothecary, and at no point has any person filed a request for a hearing on behalf of Brown's, or in the alternative, filed a written statement in lieu of a hearing. *See* 21 CFR 1301.43(c) & (d).

Both matters were nonetheless placed on the docket of the OALJ and assigned to Administrative Law Judge (ALJ) Christopher B. McNeil. Recommended Decision, at 2. On June 2, the ALJ issued an "Order For Briefing On Allegations Concerning Respondents' Lack Of State Authority" (hereinafter, Briefing Order).

Therein, the ALJ found that there was "no request for a hearing on behalf of Brown's Discount Apothecary." Briefing Order, at 2. He then provided the parties with the "opportunity to establish whether grounds exist with respect to either [pharmacy] to advance this matter to hearing, or whether the two pharmacy's [sic] DEA . . . Registration[s] should be summarily revoked and any pending application summarily denied, without a hearing." *Id.* The ALJ further ordered that "the Government may provide evidence and arguments to support the allegation that Bolling Apothecary, Inc. lacks state authority to handle controlled substances," and "may also provide evidence and arguments regarding the issue of whether Brown's Discount Apothecary has timely invoked the jurisdiction of the Office of Administrative Law Judges, or the issue of whether [it] lacks state authority to handle controlled substances, or both issues." *Id.* at 2-3. The ALJ's Order also offered Respondent the opportunity to file a response. *Id.* at 3.

Thereafter, the Government filed a Motion for Summary Disposition (hereinafter, Motion). Therein, the Government sought the revocation of each pharmacy's registration on the

ground that the Alabama State Board of Pharmacy had issued an Emergency Suspension Order which suspended each pharmacy's Alabama Controlled Substances Permit. Motion, at 2. The Government supported its motion with a copy of the Emergency Suspension Order. *Id.* at Exhibit A, at 7. However, the Government did not address whether, given the failure of Brown's Discount Apothecary to file a hearing request, the ALJ had jurisdiction to adjudicate the allegations with respect to it. *See generally* Motion, at 2-4.

While Bolling Apothecary had requested a hearing, it did not file a response to the Government's motion. Nor did Brown's file a response.

On July 6, 2015, the ALJ issued his Recommended Decision. Addressing the issue of whether he had jurisdiction to rule on the matter of Brown's registration, the ALJ explained that he had given "the Government the option of providing evidence and arguments regarding the issue of whether Brown's . . . has timely invoked the jurisdiction of this office or whether Brown's lacks state authority to handle controlled substances." R.D. at 2 n2. The ALJ then noted that "the Government elected to present evidence that Brown's . . . is currently without state authority to handle and dispense controlled substances." *Id.* The ALJ then proceeded to exercise jurisdiction over the matters involving both Brown's and Bolling, but provided no explanation as to why he was doing so with respect to Brown's. Moreover, the ALJ did not make the requisite finding as to the registration status of either Brown's or Bolling. *See Sharad C. Patel*, 80 FR 28,693, 28,694 n.3 (2015).

While the ALJ noted that neither Brown's nor Bolling had filed a response to the Government's motion, he addressed the arguments raised by Bolling Pharmacy in its Hearing Request. R.D. at 3-4. The ALJ noted that George R. Bolling, Sr. (Bolling Apothecary's owner) had filed a renewal application with the State Board the day after he bought the store and

included a copy of a warranty deed executing a transfer of the store to him from one George R. Bolling, Jr. *Id.* at 3-4. The ALJ found, however, that “nowhere in the request for hearing does either of the Respondents provide any evidence contradicting the Government’s position that both Bolling and Brown[’s] lack state authority to handle and dispense controlled substances.” R.D. at 4.¹ The ALJ thus concluded that the “Respondents do not have authority to handle and dispense controlled substances in the State of Alabama, the jurisdiction where each is licensed by the DEA to handle and dispense such substances.” *Id.* at 4. The ALJ then granted the Government’s Motion for Summary Disposition and “recommended that Respondents’ DEA Certificate of Registration . . . be revoked and that any pending application . . . be denied.” *Id.* at 5.

Neither party filed exceptions to the Recommended Decision. Thereafter, on August 3, 2015, the ALJ forwarded the record to this Office for Final Agency Action.

Having reviewed the record, I adopt the ALJ’s Recommended Decision only with respect to Bolling Apothecary. With respect to Brown’s, I find that the Government did not establish that it properly served the Show Cause Order. Moreover, even if the Government had established service, I would reject the ALJ’s decision as to Brown’s, because in the absence of a hearing request, the ALJ had no authority to rule on the issue of whether its registration should be revoked.

As for whether service was proper, 21 U.S.C. section 824(c) provides that “[b]efore taking action pursuant to this section . . . the Attorney General shall serve *upon the . . . registrant* an order to show cause why registration should not be . . . revoked[] or suspended.” (emphasis

¹ The ALJ also rejected the contention of Bolling’s owner that the pharmacy “ha[d] authority” until either his state license or his DEA registration was physically removed by a person identified only as the supervisor of a DEA Diversion Investigator. R.D. at 4 (quoting Bolling Pharmacy Request for Hearing, at 1). As the ALJ correctly explained, it is the Board of Pharmacy’s Emergency Suspension Order “and not the presence or absence of the physical license that supports the Government’s motion.” *Id.*

added). According to the Government's Notice of Service, the Government did not serve the Show Cause Order "upon the . . . [R]egistrant," *id.*, but rather on an attorney, who according to the Government "accepted service by email of the Order to Show Cause on behalf of Brown's . . . and its owner George Bolling, Jr. on June 2, 2015." Notice of Service, at 1.

However, "[n]umerous Federal Courts have held that '[t]he mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service.'" *Harbinson v. Commonwealth of Virginia*, 2010 WL 3655980, at *9 (E.D. Va. Aug. 11, 2010) (quoting *Davies v. Jobs & Adverts Online, GmbH*, 94 F.Supp.2d 719, 722 (E.D. Va. 2000)). See also *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997); *Grandbouche v. Lovell*, 913 F.2d 835, 837 (10th Cir. 1990); *Ransom v. Brennan*, 437 F.2d 5134, 518-19 (5th Cir. 1971). "Rather, the party seeking to establish the agency relationship must show "that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service."'" *Harbinson*, 2010 WL 3655980, at *9 (quoting *Davies*, 94 F.Supp.2d at 722 (quoting *Ziegler*, 111 F.3d at 881)).

While an attorney's authority to act as an agent for the acceptance of process "may be implied from surrounding circumstances indicating the intent of" his client, *In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004) (other citation and internal quotations omitted), "an agent's authority to act cannot be established solely from the agent's actions." *Id.* at 1084. "Rather, the authority must be established *by an act of the principal*." *Id.* (citing *FDIC v. Oaklawn Apartments*, 959 F.2d 170, 175 (10th Cir. 1992) (emphasis added)).

With respect to Brown's, even assuming that the attorney it served with the Show Cause Order was in an attorney-client relationship with the pharmacy, the Government has produced no evidence establishing that Brown's authorized the attorney to accept service of the Order on its

behalf. *See David M. Lewis*, 78 FR 36591, 36591 (2013) (holding service on attorney was improper where only evidence offered by Government was that “the attorney requested to take possession of the Order”) (citing *Focus Media*, 387 F.3d at 1084)). Accordingly, I find that the Government did not accomplish service on Brown’s.

Even if I concluded otherwise, under the Agency’s regulations, a hearing request must be submitted by the applicant/registrant to vest jurisdiction over the matter in the Office of Administrative Law Judges. *See* 21 CFR 1301.42 (“If requested by a person entitled to a hearing, the Administrator shall hold a hearing for the purpose of receiving factual evidence regarding the issues involved in the denial, revocation or suspension of any registration.”); *id.* § 1301.43(a) (“Any person entitled to a hearing . . . and desiring a hearing shall, within 30 days after the date of receipt of the order to show cause . . . file with the Administrator a written request for a hearing in the form prescribed”); *id.* § 1301.43(d) (“If any person entitled to a hearing . . . fails to file a request for a hearing . . . such person shall be deemed to have waived the opportunity for a hearing . . . unless such person shows good cause for such failure.”). Because in contrast to *Bolling*, Brown’s never filed a hearing request, the ALJ had no authority to offer “the Government the option of providing evidence and arguments regarding the issue of . . . whether Brown’s lacks state authority to handle controlled substances,” R.D. 2, at n.2; and he had no authority to rule on the issue.²

As for *Bolling Discount Apothecary*, its owner attached a copy of its registration with his Request for Hearing, which shows that his registration does not expire until July 31, 2017, thus rendering a remand to establish jurisdiction unnecessary. Having reviewed the Board’s

² According to the Show Cause Order, Brown’s registration was due to expire on July 31, 2015, and the registration records of the Agency, of which I take Official Notice, *see* 5 U.S.C. section 556(e), show that Brown’s allowed its registration to expire on July 31, 2015 (before the ALJ forwarded the record) and has not filed a renewal application. *See Patel*, 80 FR at 28,694 n.3. In any event, because the Government did not serve Brown’s, the matter of its registration is not before me.

Emergency Suspension Order, I adopt the ALJ's finding that the pharmacy does not have authority to dispense controlled substances in Alabama, the State in which it is registered with DEA, and that therefore, it no longer meets the statutory definition of a practitioner. *See* 21 U.S.C. section 802(21) ("The term 'practitioner' means a . . . pharmacy . . . licensed, registered, or otherwise permitted, by . . . the jurisdiction in which [it] practices . . . to . . . dispense . . . a controlled substance in the course of professional practice[.]"). *See also* 21 U.S.C. section 823(f). Accordingly, I will order that Respondent Bolling Discount Pharmacy's registration be revoked and that any pending application to renew or modify its registration be denied. *See* 21 U.S.C. section 824(a)(3); *see also* R.D. at 4 n.10 (collecting cases).

ORDER

Pursuant to the authority vested in me by 21 U.S.C. section 824(a) and 28 CFR 0.100(b), I order that DEA Certificate of Registration AB9375456 issued to Bolling Apothecary be, and it hereby is, revoked. I further order that any application of Bolling Apothecary to renew or modify its registration be, and it hereby is, denied. This Order is effective immediately.³

Dated: September 15, 2015.

Chuck Rosenberg,
Acting Administrator.

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³ For the same reasons that led the Board to order the emergency suspension of Respondent's pharmacy license (*i.e.*, the extensive allegations that it was diverting controlled substances), I find that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.